Supreme Court, U.S.
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No. 97-1666

In The

Supreme Court of the United States

October Term, 1997

KEVIN E. BRYAN and RENEE M. BRYAN,

Petitioners,

vs.

KENNETH M. CLAYTON and NEAL McCULLOH, individually and d/b/a CLAYTON & McCULLOH, a Florida general partnership,

Respondents.

On Petition For Writ Of Certiorari To The State Of Florida Fifth District Court Of Appeal

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PREFACE

As in their petition for writ of *certiorari,* the petitioners are referred to herein as "the homeowners" or "the Bryans," and the respondents are referred to herein as "the law firm." The appendix to this reply brief is cited as "[Reply App. at ___]" to contrast it with the appendix to the homeowners' petition for writ of *certiorari,* which was cited therein as "[APX. at ___]" and is accordingly cited herein as "[Petition APX. at ___]."

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REPLY TO LAW FIRM'S STATEMENT OF THE CASE

The law firm's brief in opposition contends the homeowners misstated many key facts in their petition for writ of *certiorari*. However, the law firm fails to specify, or even allude, to any examples, or to address the fact that its own correspondence (set forth in the appendix to the homeowners' petition as exhibits to the complaint) provides or substantiates most of the factual allegations of the petition. Instead, the law firm merely asserts: "scandalous, unfounded, and unproven" [Brief in Opposition at 1] in attempting to discredit the petition for writ of *certiorari*.

The law firm also overlooks that on review of summary judgment, in accordance with elementary principles of civil and appellate procedure, the appellate courts necessarily regard all pleadings and evidence in the light most favorable to the non-moving party, just as the trial court was obliged to do.

The law firm further contends [Brief in Opposition at 2] that the homeowners have posed a different issue here than in the state appellate courts. However, the homeowners merely framed the federal question in the disjunctive. This was done in order to succinctly give context, structure and consequences to the issue – *i.e.*, if community association dues and assessments and ancillary charges are held *not* to be "debts" under the FDCPA, then the unavoidable consequence will be that third party collection agents are exempt from having to comply with

the FDCPA's prohibitions against overreaching, intimidation, misrepresentation, etc., when attempting to collect these obligations.

The law firm obfuscates the foregoing by appearing to suggest that the homeowners are seeking a determination by this Court that the law firm is a "debt collector" as defined under the FDCPA, and that such determination was either not preserved or else should instead be made on remand, as a mixed matter of law and fact. [Brief in Opposition at 4-5]. The homeowners concur that the issue of "debt collector" *vel non* must await remand – necessarily, one cannot later be found to be a "debt collector" unless one is first determined to be collecting a "debt" – and the meaning of "debt" is precisely what is presently before this Court. Thus, in framing the question presented herein, the homeowners carefully referred to the law firm and to others similarly situated as "third party collection agents" rather than "debt collectors." [Petition for Writ of *Certiorari* at *i*]. Although the homeowners expressly pled in ¶ 15 of their complaint that the law firm is a "debt collector" as defined by the FDCPA [Petition APX. at 22], they recognize they will need to prove the allegation on remand – once the controversy over the meaning of "debt" is adjudicated by this Court.

REPLY TO LAW FIRM'S REASONS FOR DENYING THE WRIT

I. The issue on review is whether community association dues, etc., are "debts," not whether the law firm is a "debt collector."

As discussed *supra*, the law firm has misread or misstated the issue herein. The law firm is likewise in error when it claims [Brief in Opposition at 6] that none of the few courts which have considered the issue of applying the FDCPA to dues or assessments has considered whether a law firm was a "debt collector." To the contrary, the district court in *Nance v. Petty, Livingston, Dawson & Devening*, 881 F. Supp. 223 (W.D. Va. 1994) expressly considered this issue. *Nance* ruled, as an alternative holding to its perplexing reliance on *Mabe v. G.C. Services, Ltd.*, 32 F.3d 86, 88 (4th Cir. 1994) (involving past due child support), that as a matter of law, a law firm whose collection activities only comprised approximately 1% of its caseload could not be a "debt collector" with respect to homeowner association assessments for repair and maintenance of a private road to the subdivision. *Sub judice*, it should be fairly self-evident that before calculating the percentage of a law firm's practice devoted to "debt collection," one must first determine what constitutes a "debt" – which is precisely the question presented herein.

Finally, the law firm purports to quote the trial court herein as holding that the law firm was not a "debt collector." [Brief in Opposition at 7]. However, in quoting

the trial court, the law firm failed to include the following, italicized, explanatory portion of the trial court's opinion:

> Clayton, McCulloh and Clayton & McCulloh may not be considered 'debt collectors' *because under the reasoning of the cases discussed above, the amounts those defendants attempted to collect were not 'debts' under the federal or state acts. As such, no claim for relief may be stated against these defendants under either act in the instant case.* [emphasis added]

[Petition APX. at 12].

II. The law firm's attempt to limit *Newman* and *Bryan* is inconsistent with those cases, with the cases they cite, and with the FDCPA.

The law firm's attempt to distinguish *Newman* and *Bryan* as dependent on state law is a red herring. Neither opinion states or fairly implies that its result was dependent on or influenced by the uniqueness of the corporate law, condominium law or homeowner association law of the forum state, nor do any of the authorities cited by *Newman* or *Bryan* so suggest. Rather, all of the opinions recognize that the homeowner or condominium owner is obliged by contractual or recorded restrictive covenants or by a declaration of condominium to pay dues and assessments. As relevant here, whether such obligation is enforceable by common law or statutory law is a distinction without a difference, and the law firm's attempt to inject mere speculation into this non-issue should be seen for what it is. Under the law firm's perspective, the

concepts of *stare decisis* and precedent would be empty phrases.

Finally, the law firm's balloon of speculation on unique state law is further punctured by the FDCPA itself, which provides that:

> It is the purpose of this subchapter . . . to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692(e) [Petition APX. at 56].

III. & IV. The law firm's arguments on rendition, untimeliness and jurisdiction were previously argued to and implicitly rejected by the Florida Fifth District Court of Appeal and by the Florida Supreme Court.

As this Court recognized in *Florida Star v. B.J.F.*, 484 U.S. 984 (1987), the appellate jurisdiction of Florida state courts is a matter of Florida law in the first instance. Thus, where a Florida appellate court determines it has appellate jurisdiction, such finding of jurisdiction under state law will be honored by this Court. *Id.*

The foregoing is significant because the law firm's arguments III and IV attempt to re-litigate here virtually the identical jurisdictional objections it unsuccessfully asserted to the Florida Fifth District Court of Appeal [Reply App. at 7-15] and to the Florida Supreme Court [Reply App. at 28-41].[1] For example, the law firm's

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[1] The homeowners' motion to the Florida Fifth District Court of Appeal to stay or recall mandate and the homeowners'

response to the Florida Fifth District Court of Appeal on the homeowners' motion to stay or recall the mandate urged that:

> . . . Therefore, the jurisdiction of this court to recall and/or reconsider that judgment ended on July 7, 1997.

[Reply App. at 14, ¶ 32]. Rejecting such coaxing, the Florida Fifth District Court of Appeal labored with the homeowners' motion for almost two months, culminating in its order of September 12, 1997 denying the motion to stay or recall ***on the merits***, not on the jurisdictional challenge.

Undaunted, the law firm's brief on jurisdiction to the Florida Supreme Court also denied the latter court had jurisdiction, claiming, *inter alia*:

> The Bryans' notice to invoke the discretionary jurisdiction of the Florida Supreme Court . . . was ***not timely*** filed pursuant to law and the rules of appellate procedure. [emphasis in original].

[Reply App. at 32]. Accordingly, the law firm concluded by urging that the Florida Supreme Court:

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brief on jurisdiction to the Florida Supreme Court are also furnished in the appendix hereto [Reply App. at 1-6, 16-27, respectively] out of an abundance of precaution – not to re-argue the state jurisdictional issues, but simply to provide an evidentiary record that the jurisdictional issues were fully explored by both litigants in the state appellate courts after the June 25, 1997 order denying rehearing.

> [S]hould summarily reject jurisdiction and *dismiss* the instant notice to invoke discretionary jurisdiction. [emphasis added]

[Reply App. at 41]. Notwithstanding the urging of the law firm, the Florida Supreme Court elected ***not*** to dismiss the petition, nor did it find it lacked jurisdiction, but instead merely "decline[d] to accept jurisdiction," [Petition APX. at 18], and chose to deny discretionary review. [*Id.*] *Cf. Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988). The difference is subtle but significant. Had the Florida Supreme Court deemed itself to be without jurisdiction, a *dismissal* of the petition for review would have been appropriate, as requested by the law firm, rather than *denial* of the petition for review. *See, e.g., Florida v. Walker*, 593 So.2d 1049, 1050 (Fla. 1992), and discussion in *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So.2d 646, 648-49 (Fla. 2d DCA 1995). *See also* Illustrative Table of Florida Decisions Without Published Opinions at 705 So.2d 7 (Fla. 1997), and *compare, e.g., Brown v. Pezzi*, 705 So.2d 7 (Fla. 1997) (review denied) *with Adams v. Lockheed Martin*, 705 So.2d 7 (Fla. 1997) (review dismissed).

Finally, the law firm ignores that it is principally the fifth district's order of September 12, 1997 that is on review herein, and not its order of June 25, 1997. It was not until September 12 that said court refused to yield to *Newman* and afforded the homeowners a basis to seek discretionary review by the Florida Supreme Court and ultimately by this Court.

V. Ripeness is in the eyes of the beholder.

The homeowners recognize this Court generally prefers more than two appellate opinions on an issue before accepting *certiorari* jurisdiction. However, competing considerations surely exist here. There have been multiple federal district court opinions on the specific issue in a fairly short time span. This suggests that the abuses addressed by the FDCPA appear to exist frequently in the context of collection efforts for community associations. Yet, the amount involved in these controversies, combined with the potential dire consequences to a homeowner or condominium owner if ultimately unsuccessful, are likely to have a chilling effect on the number of appeals in any forum. Moreover, a denial of *certiorari* will most likely disenfranchise other similarly situated citizens of the nation's fourth most populous state from ever utilizing the state court system to enforce the FDCPA,[2] and even though Congress granted concurrent jurisdiction for its enforcement to both the federal and state courts. 15 U.S.C. § 1692k(d).

The law firm has further urged this Court to decline jurisdiction on the basis it should wait and see what

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[2] Florida has five intermediate district courts of appeal, arranged geographically. Section 35.01, *Fla. Stat.* (1997). All state trial courts in Florida are compelled to follow *Bryan*, regardless of their location, unless and until there is a conflicting decision directly on point from that trial court's district court of appeal. *See, e.g., Pardo v. Florida*, 596 So.2d 665, 666-67 (Fla. 1992). Accordingly, absent *certiorari*, it is unlikely a subsequent Florida plaintiff will be daring enough to challenge the holding of *Bryan* in state court, knowing that an appeal will be essential in order to attempt to avoid the holding in *Bryan*.

Congress does in future legislative sessions. Yet, there is no good reason to do so. The potential for new legislation, the content thereof and its timing are pure speculation, whereas the present law is clear. This Court was likewise clear in *Heintz v. Jenkins*, 514 U.S. 291, 297-98 (1995) that express manifestations of congressional intent should be enforced and not thwarted.

Although the homeowners are not so bold as to urge summary reversal, they do submit that the conflict is sufficiently crystallized presently, and an indefinite delay in its resolution would be sufficiently injurious to the public interest that a denial of *certiorari* would manifest itself in the adage that "justice delayed is justice denied."

CONCLUSION

For the reasons stated above and in the homeowners' petition, this Court should accept jurisdiction and enforce the FDCPA as plainly meant, written, and intended. The Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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